No. 91-1521

In The
Supreme Court of the United States
October Term, 1991

UNITED STATES OF AMERICA,
Petitioner,

vs.

LOWELL GREEN,
Respondent.

ON WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER.

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This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national membership organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

STATEMENT OF FACTS

The court below, *U. S. v. Green,* 592 A.2d 985 (D.C. App. 1991), held that, in accordance with the rule of *Edwards v. Arizona,* 451 U.S. 499 (1981), and *Arizona v. Roberson,* 486 U.S. 675 (1988), the respondent's (hereinafter referred to as defendant) invocation of the Fifth Amendment right to counsel during custodial interrogation bars further police-initiated interrogation about an unrelated offense, even when a continuously incarcerated defendant has consulted with counsel concerning a first offense to which he had pled guilty.

ARGUMENT

EDWARDS V. ARIZONA DOES NOT REQUIRE SUPPRESSION OF A VOLUNTARY CONFESSION BECAUSE LAW ENFORCEMENT OFFICERS INITIATED INTERROGATION OF A SUSPECT FIVE MONTHS AFTER HE HAD INVOKED HIS RIGHT TO COUNSEL REGARDING AN UNRELATED OFFENSE.

TO OBVIATE THE FUTILITY OF SEEKING A RECONCILIATION OF THE VARIOUS CASES DEALING WITH THE INTRINSIC PROBLEM PRESENTED IN THE INSTANT CASE, THIS COURT SHOULD ADOPT A MODIFICATION OF THE MANDATES OF *MIRANDA V. ARIZONA*. THE MODIFICATION WE URGE UPON THE COURT WOULD ACTUALLY CONSTITUTE A "BRIGHT LINE" GUIDE FOR THE POLICE AND THE LOWER COURTS.

In the Court's grant of certiorari the question presented was with respect to the application in this case of the "bright line rule" of *Edwards v. Arizona,* 451 U.S. 499 (1981), and *Arizona v. Roberson,* 486 U.S. 675 (1988). *Amici* submit that rather than reiterate the analysis and views expressed in our *amicus* brief in *Roberson*, or attempt a discussion of the

"bright line" concept, we here wish to offer a broader and more basic approach, one that can avoid the problem addressed in *Roberson* and in many other similar cases that have resulted from the application of the mandates of *Miranda v. Arizona,* 384 U.S. 436 (1966).

As background for the proposal, we ask the Court's indulgence to first consider the following excerpts from a study published in 1987. It involved a tabulation and commentary regarding the extent to which appellate court consideration was given, from 1966 through 1986, to *Miranda* issues, by this Court, the Federal Circuit Courts of Appeal, and, as a state example, the Appellate Courts of California. The study sought to answer the question: "Miranda v. Arizona - Is It Worth the Cost?"[1]

Summary Of Survey Results

[Supreme Court of the United States]

From 1966 through 1986, substantive *Miranda* issues were considered in forty-four cases, for a total of 606 printed pages in the official United States reports, consisting of approximately 160,000 words. The government prevailed in 31 of the cases and the contesting party in 13.

(Since 1986 through June 1987, the Supreme Court rendered three additional *Miranda* decisions, in which the government prevailed in all of them. The opinions in the three new cases cover forty-six pages and contain approximately 12,000 words. The total number of cases, therefore, exclusive of *Miranda* itself, amounts to forty-seven, with 652 pages and 172,000 words.)

[1] 24 *Calif. Western Law Rev.* 185-200 (1987-1988).

[No tabulation has been made since 1987.]

It was once thought that after the initial impact of *Miranda,* the various issues that might arise from it would soon be resolved by the Supreme Court in other cases. The prediction was that there would be an eventual diminution of litigation over *Miranda's* requirements not only in the Supreme Court, but also in lower federal appellate courts, and in the state appellate courts as well. As reasonable as that assumption may have been, the facts are to the contrary . . . [T]he number of *Miranda* issue cases decided by the Supreme Court has actually increased during the twenty year period since its inception, along with substantial increases in the number of pages and words in the opinions disposing of them.

[United States Circuit Courts of Appeal]

Miranda issues were discussed in 980 cases decided during the period 1966-1986. The opinions consisted of 2,155 pages and approximately 1,200,000 words. The prosecution prevailed in 803 cases, the defense in 177.

[No tabulation since 1987.]

[California Courts of Appeal]

The California courts of appeal decided 363 cases from 1966 through 1986, for a total of 905 pages and approximately 450,000 words, dealing solely with substantive *Miranda* issues. The prosecution prevailed in 281 cases, the defense in 82.

[No tabulation since 1987.]

[No attempt was made in the study to ascertain the frequency with which *Miranda* issues were decided at the trial court level, nor was it feasible to do so. Nevertheless, judging from the appellate court fre-

quency, it can reasonably be presumed to be extraordinarily high.]

Commentary

* * *

[*An Example of Confusion Regarding Miranda*]

United States v. Mesa, [638 F.2d 582 (1980)] decided by the Third Circuit Court of Appeals in 1980, involved the twin issues of "custody" and "interrogation" within the meaning of *Miranda's* mandate. The defendant had been a fugitive on an arrest warrant for the shooting of his daughter and his common law wife. He was located by the FBI in a motel room where he had barricaded himself. An FBI agent called to him repeatedly on a bullhorn, urging him to come out. He refused, but agreed to talk on a mobile phone to an FBI negotiator. Their conversation was recorded and in it the suspect made some incriminating statements, after which he peacefully surrendered. A United States district court suppressed the statements on the ground that they were made in a custodial situation, without the suspect having received the *Miranda* warnings. On appeal the circuit court reversed in a two to one decision. The chief judge concluded that "where an armed suspect who possibly has hostages barricades himself away from the police, he is not in custody [within] the meaning of the *Miranda* rule." Another judge concluded that the FBI agent's conversation with the suspect did not constitute interrogation, and for that reason the warnings were not required. The third judge dissented because he concluded that there was *both* custody and interrogation, thus necessitating the warnings.

If, as in *Mesa,* three federal appellate court judges come to three different conclusions as to whether

"interrogation" and "custody" existed in a specific case situation, is it not unreasonable to expect law enforcement officers to make the required appraisals under conditions where they do not have the luxuries of time for deliberation or the availability of library facilities and the skill to use them?

* * *

[*Gross Misconceptions*]

There is a gross misconception, generated and perpetuated by fiction writers, movies, and television, that if criminal investigators carefully examine a crime scene, they will almost always find a clue that will lead them to the offender; and that, furthermore, once the criminal is located, he will shunt aside his self-preservation instinct and readily confess or otherwise reveal guilt, as by attempting to escape. This however, is pure fiction. As a matter of fact, the art and science of criminal investigation has not yet developed to a point where the search for and the examination of physical evidence will always, or even in most cases, reveal a clue to the identity of the perpetrator or provide the necessary legal proof of guilt. In criminal investigations, even of the most efficient type, there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, as well as of others who may possess significant information.

* * *

The majority opinion in *Miranda* attributes to the Federal Bureau of Investigation a practice consistent with what the Court mandated in that case for *all* police interrogators. It suggested that "the practice of the FBI can readily be emulated by state and local law enforcement agencies." Two basic flaws are present in that conclusion. First, as Justice Harlan, one of the

four dissenting Justices, pointed out, the FBI's interrogation practices were considerably short of *Miranda's* formalistic rules: "For example, there is no indication that FBI agents must obtain an affirmative 'waiver' before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind. And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him . . ."

* * *

[*The "Guiding Hand" of Counsel*]

Once a lawyer enters upon an interrogation scene, he will very rarely do anything more than instruct his client to keep his mouth shut. As the late Supreme Court Justice Jackson stated in a 1948 case, "[t]o bring in a lawyer means a real peril to the solution of the crime . . . Any lawyer worth his salt will tell the suspect . . . to make no statement to police under any circumstances." *Watts v. Indiana,* 338 U.S. 49, 59 (1948).

* * *

[*Miranda's Protection of the Poor, Unintelligent, or Uneducated Suspect*]

It is an undeniable fact that a very high proportion of criminal offenders are from the ranks of the poor, the uneducated, or the unintelligent. Many of them are entitled to compassion and to whatever rehabilitation society has to offer. The time to display that compassion, however, is *after* a determination has been made as to whether the suspect with such an unfortunate background actually committed the criminal offense for which he is suspected. He is hardly a fit subject for rehabilitation if his unlawful conduct is undetected, or if he has been unwilling to admit committing such

conduct. He or she is hardly amenable to rehabilitation as long as there is a denial of the wrongdoing; and *Miranda* is a roadblock to admissions.

A criminal offender who has "beaten the rap" because of the benefit bestowed upon him by *Miranda* is bound to have a lessened respect, or even contempt, for the legal system that permits such an escape chute. This, too, we suggest has a psychological disadvantage with respect to attempts at rehabilitation.

One further point with regard to the underlying social philosophy of *Miranda*: a very high percentage of the *victims* of crime are from the ranks of the poor, the uneducated, or the unintelligent. It is of no comfort to them to be told by the police investigators that they had been handicapped in their efforts because of court rulings requiring warnings to arrested suspects of their rights to silence and to a lawyer—warnings that are required so as to equalize humanity; in other words, to even things out as regards the poor and the rich, the uneducated and the educated, the unintelligent and the intelligent. This is not likely to produce tears in the eyes of victims who have been raped or robbed, or whose home has been burglarized while they were away at work earning a living. Such a reaction is also not to be expected when the victims are subsequently told that their offenders had been brought to trial but were acquitted, or had their convictions reversed, because they were either not warned of those rights or that the rights were not properly administered.

CONCLUSION

In addition to the *Miranda* confusion and the misconceptions within the courts, those of us who must instruct the police on the law governing interrogations and confessions encounter unsurmountable difficulty in satisfactorily explaining what the "bright line" is for such case situations as in *Arizona v. Roberson, supra, McNeil v. Wisconsin,* __ U.S. _, 111 S.Ct. 2204 (1991), *Patterson v. Illinois,* 487 U.S. 285 (1988), and *Minnick v. Mississippi,* __ U.S. __, 111 S.Ct. 486 (1990). To the police the line is a very fuzzy one, and the frustration they experience could result in a shrug of the shoulders and a disrespect for the courts that sit in judgment over their conduct.

As a means for avoiding, or at least considerably diminishing, the confusion that presently exists within both the courts and the law enforcement community with regard to *Miranda's* mandates, we respectively urge the court to consider the following proposal:

***Miranda* should be modified in a way that would indeed provide a truly bright line for guidance. That modification should require that *all* suspects, whether in custody or not, be told "You have a right to remain silent." Period!**

If the suspect refuses to talk or states that he wants a lawyer, the interrogation must cease, unless the suspect subsequently indicates a willingness to talk about the matter under investigation. If he does, and the warning is again issued of his self-incrimination privilege, there may be questioning about the present offense, as well as any *unrelated* offense. Even if the suspect does not initiate such a willingness, the police may attempt to question him about *unrelated* offenses, preceded, of course, by the self-incrimination warning.

This suggested modification of the presently existing requirement would be readily understandable to the police, and it would render more effective their investigative efforts to solve serious crimes. It would also serve *Miranda's* basically intended purpose of letting the suspect know that he has a constitutional privilege not to incriminate himself. With such a modified requirement the police and the courts can "get along."

We respectfully urge the Court to give consideration to our proposal.

Respectfully submitted,

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